JD(SF)-74-05
Wasilla, AK

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

WAL-MART STORES, INC.

and **Case 19-CA-27720**

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

S. Nia Renei Cottrell, Esq., of Seattle, Washington, appearing on behalf of the General Counsel.

Paul M. Ostroff, Esq., for Lane, Powell, Spears, Lubersky, LLP, of Portland, Oregon, appearing on behalf of Respondent

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SUPPLEMENTAL DECISION

BURTON LITVACK: ADMINISTRATIVE LAW JUDGE

Statement of the Case

The Regional Director of Region 19 of the National Labor Relations Board, herein called the Board, issued the complaint in the above-captioned matter, alleging that Wal-Mart Stores, Inc., herein called Respondent, had engaged in acts and conduct violative of Section 8(a)(1) of the National Labor Relations Act, herein called the Act, on April 29, 2002. I presided at the trial on the merits of the allegations of the complaint on June 27 and 28, 2002 in Anchorage, Alaska and, on November 8, 2002, based upon the Board's decision in Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000), enfd. In relevant part 268 F3d 1095 (D.C. Cir. 2001), cert. denied122 S.Ct. 2356 (2002), issued my decision, finding that Respondent had engaged in violations of Section 8(a)(1) of the Act by requiring an employee, Ken Stanhope, who had a reasonable belief that the matters to be discussed may have resulted in discipline against him, to continue to participate in an investigatory interview after it had denied his request for the presence

of his own witness and by discharging its employee Stanhope. Subsequently, on December 16, 2004, the Board issued its decision in the above-captioned matter and, based upon its recent decision in IBM Corporation, 341 NLRB No. 148 (2004), reversed my finding of a violation of Section 8(a)(1) of the Act with regard to Respondent's conduct of requiring Stanhope to continue to participate in an investigatory interview, which he believed might result in discipline against him, after denying his request for the presence of an employee witnesses and, with regard to the discharge of Stanhope, remanded the matter to me to clarify whether I found that Respondent discharged him for requesting a witness on March 16, 2001 or for refusing to participate in an investigatory interview without the presence of an employee witness on March 17.[1]

FINDINGS OF FACT

In NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), the Supreme Court held that an employer violates Section 8(a)(1) of the Act by denying an employee's request that his union representative be present during an investigatory interview, which the employee reasonably believes might result in disciplinary action against him. Subsequently, in Materials Research Corp., 262 NLRB 1010 (1982), the Board concluded that, in a nonunion setting, employees were entitled to the same rights, enunciated by the Supreme Court in J. Weingarten, Inc., as employees who are represented by a union; however, in Sears, Roebuck & Co., 274 NLRB 230 (1985), the Board reversed itself, holding that Act compelled the conclusion that the Weingarten principles do not apply in circumstances where there is no recognized or certified labor organization. Thereafter, in E.I. DuPont & Co., 289 NLRB 627 (1988), the Board overruled Sears, Roebuck & Co., concluding that the Act does not compel a conclusion that Weingarten rights do not apply in a nonunion workplace; rather, ". . . the refusal to extend Weingarten to the nonunionized workplace was a permissible interpretation of the Act, and . . . adopting this interpretation was supported by significant policy considerations." IBM Corporation, supra, at slip op 2. Then, in Epilepsy Foundation of Northeast Ohio, supra at 679, the Board overruled E.I. DuPont & Co. and reinstituted the standard set forth in Materials Research Corp, stating ". . . that the rule enunciated in Weingarten applies to employees not represented by a union as well as to those that are." Finally, in IBM Corporation, the Board again reversed itself, stating ". . . the policy consideration supporting that decision do not warrant particularly at this time . . ." as "in recent years there have been many changes in the workplace environment, including ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence." Id. at slip op 3. Continuing, the Board held that, in the nonunionized setting while an employee retains a Section 7 right to request the presence of a co-worker during an investigatory interview, which the employee reasonably believes might result in discipline against him, and can not be disciplined for asserting said right, the employer has no obligation

[1] On January 24, 2005, counsel for the Charging Party filed a Motion for Reconsideration with the Board, and, and, on August 2, the latter denied it in part and, in part, held the motion in abeyance to the extent that it concerned retroactive application of IBM Corporation to the matter of Stanhope's discharge. The Board was silent as to whether I should comment upon this issue.

to accede to the request. Id. at slip op 7.[2]

In my underlying decision, I noted that two management representatives, Marlene Munsell, the store manager of Respondent's retail department store in Wasilla, Alaska, and Bruce Manderson, the co-manager, testified at the trial. Based upon their respective, uncontroverted testimony, I found that, on March 16, investigating allegations made by employee Cynthia Adams regarding a confrontation between Stanhope and her on March 10, the two management representatives met with Stanhope in order to obtain his version of the incident; that, at the outset of the meeting, Stanhope demanded that he be permitted to have his own witness present during the interview;[3] that Munsell denied his request;[4] that Respondent's representatives then continued the interview; but, after some verbal sparring, they abruptly terminated the meeting, sending Stanhope home for the remainder of the day with instructions to prepare a written statement of his recollection of the incident; and that, subsequent to the aborted meeting upon speaking to a company personnel manager, Manderson and Munsell decided that, if Stanhope failed to provide the requested statement, they would make a decision on Adams' allegations based upon information previously gathered. I further found that, on March 17, Manderson approached Stanhope at the store and requested that the latter follow him to an office; that Stanhope responded, unless he was permitted to have a witness present, he would refuse to meet with Manderson; that Manderson refused to accede to Stanhope's condition and said their meeting had to be private; that Stanhope again said he refused to meet with the facility's co-manager unless a witness was present; that Manderson asked if Stanhope had prepared a

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[2] The foregoing history of Board decisions on the issue of the extension of the Weingarten right to the nonunion workplace disconcertedly demonstrates that the Board has ruled and reversed itself no less than five times in just 24 years. In a legal setting which requires settled principles of law rather than partisan homily, practitioners, employers and labor organizations, Board personnel, including its administrative law judges, and the general public, including union-represented and non-union employees, have not been well served by this ever changing case law. Rather than being based upon some innovative or insightful analysis of the Act, these reversals of approach appear to be wholly dependent upon the differing Board majorities. Moreover, that the legal analysis in each case is obviously well reasoned adds to the confusion, with the deplorable result being employers inconversantly engaging in unfair labor practices and non-union employees unknowingly losing the protection of the Act or, worse, their jobs. What is required, of course, is clarity as to this aspect of Board law and adherence to the principle of *stare decisis* by Board members no matter the result.

[3] In accord with counsel for Respondent's concession, the Board apparently agreed that, by demanding the presence of a witness, Stanhope thereby invoked his Weingarten right.

[4] That Respondent viewed Stanhope's demand for a witness as an act of insubordination and reacted with reprobation is clear as Manderson immediately reacted by threatening Stanhope that, if he persisted in demanding a witness, Respondent would send him home for the remainder of the day and continue the investigation without his input. As I noted in my initial decision, sending an employee home for the day is the last step of Respondent's progressive disciplinary procedure.

written account of his confrontation with Adams and the employee said, no; that Manderson responded, in those circumstances, he would have to conclude the investigation without Stanhope's input; and that, thereupon, Manderson told Stanhope he was terminated. Finally, I found that Manderson listed four factors as underlying Respondent's decision to terminate Stanhope-- his refusal to cooperate in the investigation of Adams' allegations and his refusal to provide a statement, Adams becoming distraught over what occurred during her alleged confrontation with Stanhope, and the latter's use of profanity during said incident. When asked if Stanhope insisting upon having a witness present and not providing anything without a witness present comprised his failure to cooperate, Manderson admitted "that was part of it"[5] and conceded he could not distinguish between the weight Respondent accorded each of the foregoing factors in deciding to terminate Stanhope. Accordingly, as, during the investigatory interview on March 16, Stanhope requested the presence of an independent witness, as store co-manager Manderson admitted Stanhope's refusal to cooperate in the investigation of Adams' allegations was a factor in Respondent's discharge decision and Stanhope's insistence upon the presence of a witness "was a part of it," and as the Board concluded, in IBM Corporation, supra, that a nonunion employee has a Section 7 right to request the presence of a fellow employee during an investigatory interview which, he reasonably believes, might result in discipline against him and can not be disciplined for asserting said right, I reiterate my prior finding that the record evidence establishes that Stanhope's demand on March 16 for a witness during his investigatory interview was a motivating factor[6] in Respondent's decision to discharge him.

Pursuant to the Board's remand, I now must determine, in accord with the burden shifting analysis of Wright Line, 251 NLRB 1083, 1089 (1980), enfd. 662 F2d 899 (1st Cir. 1981), cert denied 455 U.S.989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), whether Respondent established that it would have discharged Stanhope even absent his demand for the presence of a witness during the March 16 investigatory interview. In this regard, as mentioned above, store co-manager Manderson listed four factors underlying Respondent's decision to discharge Stanhope-- his failure to cooperate in the investigation of Adams' allegations, including not providing a written statement of his version of the incident, his use of profanity during the alleged confrontation, and Adams' distraught reaction to what assertedly occurred during the alleged incident. As to Stanhope's failure to cooperate during the investigation of his encounter with Adams,

[5] According to Manderson, Stanhope's failure to provide a written account of the alleged incident comprised the other part of his "refusal to cooperate."

[6] The Board specifically noted that it was unclear whether I found Stanhope was discharged because he requested a witness on March 16 or because he refused to participate in an investigatory interview on March 17 without the presence of a witness, and I recognize that, pursuant to IBM Corporation, supra, while the former continues to constitute protected Section 7 activity, the latter conduct is now unprotected by the Act. However, after careful scrutiny of the record and based upon Manderson's less than precise admission at trial, I think that both what occurred on March 16 and March 17 constituted equal motivating factors in Respondent's decision-making process.

while Manderson admitted the former's lack of cooperation included protected activity, his request for an independent witness during the March 16 investigatory interview, it also encompassed unprotected activity including refusing to attend the meeting on March 17 without the presence of a witness and refusing to supply a statement of his recollection of the encounter with Adams. While Munsell failed to mention Stanhope's conduct during the investigation of Adams' allegations as a reason for the former's discharge, in accord with Manderson, she did assert Stanhope's "gross misconduct" during the Adams incident as Respondent's reason for discharging him.[7] Regarding this, while Adams' written version of the alleged incident and her assertions therein concerning Stanhope's language, upon which Respondent relied, are of rather dubious validity,[8] a surfeit of record evidence exists that Adams appeared to be upset and agitated by Stanhope's behavior during the alleged incident, and the latter failed to deny the comments attributed to him by Adams. In these circumstances, the question remains-- would Respondent have discharged Stanhope absent his invocation of his Section 7 right to request the presence of a witness during his the March 16 investigatory interview? On this point, while there exists record evidence that Respondent previously had discharged, at least, eight employees for use of profanity, including uttering the word "fuck," in the workplace and for other inappropriate conduct, only two of the eight associates were immediately terminated, with the other six associates initially received lesser levels of discipline for their respective acts of misconduct, including use of the word "fuck." Nevertheless, Respondent asserts that Stanhope's alleged misconduct was so severe as to warrant immediate discharge. While recognizing that not all instances of misconduct are the same and deserve different levels of discipline, given Stanhope's unprotected refusal to meet with Manderson on March 17 without the presence of an independent witness and his failure to provide a written account of his version of the alleged March 10 incident together with Adams' agitated reaction to whatever occurred during her encounter with Stanhope and the latter's failure to deny Adams' allegations of his use of profanity during it, there

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[7] She defined Stanhope's misconduct as causing Adams to feel intimidated, invading her space, use of foul language, and causing emotional distress severe enough so as to interfere with Adams' ability to work.

[8] A comparison of Cindy Adams' testimony at trial and her written statement to Respondent, regarding the incident, reveals that the two accounts of her asserted confrontation with Stanhope are utterly inconsistent and contradictory. Thus, her two versions conflict as to how the conversation began, what was said, and how it concluded. Moreover, I note that, while she recalled Stanhope as being red-faced and flinging his arms about in answering a question from me, she failed to describe Stanhope's appearance in her account to Manderson. The foregoing convinces me that little, if any, credence should be afforded to Adams' written or verbal accounts of the alleged March 10 incident, including its occurrence. Nevertheless, the record is clear that she provided a written account of what assertedly occurred to Respondent, and the record establishes that Manderson and Munsell acted upon it to the point of seeking Stanhope's version of what allegedly occurred. Accordingly, while not believing it to be reliable or truthful, as Respondent acted upon Adams' written version of an incident, I shall likewise rely upon it but only as the precipitating document for what occurred herein.

exists record evidence sufficient to support Respondent's position that Stanhope engaged in misconduct warranting immediate discharge.[9] Accordingly, I find that, in the foregoing circumstances, Respondent has established that it would have discharged Stanhope notwithstanding his act of requesting an independent witness during the March 16 investigatory interview and that, therefore, Respondent engaged in no acts and conduct violative of Section 8(a)(1) of the Act by said discharge.

CONCLUSIONS OF LAW

1. Stanhope's demand for the presence of a witness during the March 16 investigatory interview was a motivating factor in Respondent's decision to discharge him.

2. Even absent Stanhope's protected activity, Respondent would have terminated him.[10]

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[9] I am cognizant that my findings now contradict those in my original decision, which was based upon the Board's reasoning and holding in Epilepsy Foundation of Northeast Ohio, supra.. In this regard, I emphasize the importance of Stanhope's March 17 refusal to meet with Manderson in order to discuss Adams' allegations unless he was able to have a witness present. In my original decision, coupled with his demand for a witness on March 16, Stanhope's then protected act was central to my conclusion that his failure to cooperate in the investigation of Adams' allegations was a precipitating factor, equal in weight to any other, in Respondent's decision to discharge him. However, given the reasoning of the Board in IBM Corporation, supra, unlike his actions the day before, Stanhope's March 17 refusal to meet with Manderson without the presence of a witness no longer may be considered as being privileged by Section 7 of the Act. Consequently, Stanhope's only protected act, his demand for a witness on March 16, is of reduced significance as a precipitating factor, and Respondent's contention that Stanhope's March 17 conduct was itself an act of insubordination appears to be meritorious. In fact, one might reasonably argue that, it independently may have been of sufficient magnitude so as to justify Respondent's termination of him.

[10] The crux of counsel for the Charging Party's motion for reconsideration is that the Board should not retroactively apply the legal principles of IBM Corporation, supra, to the discharge of Stanhope and should adopt the result and remedy, which I set forth in my original decision. In this regard, inasmuch as the Board remanded the matter to me, as, in its Order, dated August 2, 2005, the Board was silent regarding whether I should comment on the matter of retroactivity, as the Board is holding the issue in abeyance pending my decision on remand, and as my remand decision is based upon the reasoning of the Board in IBM Corporation, I respectfully believe it appropriate to address the retroactivity issue. In doing so, I do not recommend any result but, rather, emphasize three points, which, I believe, the Board should consider in reaching its decision on counsel's motion. Initially, given my finding that Respondent would have terminated Stanhope notwithstanding his protected act on March 16, one may certainly conclude that the Charging Party's motion should be easily denied. However, I note that the Board's reasoning in IBM Corporation is central to my findings on remand, particularly concerning the crucial nature of Stanhope's March 17 refusal to meet with Manderson, and, therefore, whether said decision should be retroactively applied to

Continued

ORDER[11]

IT IS RECOMMENDED that the complaint herein be dismissed in its entirety.

Dated:

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Burton Litvack
Administrative Law Judge

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Stanhope's discharge is a matter of significance. Next, the alleged discriminatee Stanhope did not testify at the trial. Therefore, of course, we have no direct knowledge and can only speculate as to whether, when he requested an independent witness on March 16 and refused to participate in a meeting on March 17 unless permitted to have a witness present, he was aware of the law under Epilepsy Foundation of Northeast Ohio, supra. However, the Board views Stanhope's request for a witness as being tantamount to requesting the presence of a representative on his behalf, and I find it impossible to conceive that Stanhope would have placed his job at risk on two occasions unless he understood the then current state of Board law and was relying upon it for protection. Further, I believe the Board and court decisions in Epilepsy Foundation of Northeast Ohio, which, of course, involved almost the identical fact and legal situation as involved herein, represent clear case precedent for the Board in this matter. Thus, in its decision, in determining whether to retroactively apply its ruling, which, of course, involved a changed view of the law regarding the extension of Weingarten rights to non-union employees, to the employer, the Board utilized its longstanding legal analysis for said issue and concluded that doing so would not work a manifest injustice. 331 NLRB at 679. In particular, the Board noted that there existed no evidence that the "employer ever" relied upon the existing Board law or that it was at all receptive to the rights of its employees to engage in protected concerted activities. Id. at 679-80. However, inasmuch as the employer acted in conformity with the existing Board law and could not have been aware that the Board might change its view of the law, the District of Columbia Circuit refused to enforce the Board's ruling, regarding retroactive application of the changed law to the employer. The court viewed it as a matter of "equity and fairness" not to apply the changed law to the employer. 268 F3rd 1095 at 1102. Arguably, of course, the same result should attach to Respondent's discharge of Stanhope. Finally, noting the absence of testimony from Stanhope, it is significant that the court did not require actual knowledge of the law by the employer.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.